

## **Contributory negligence and the (motor)cyclist**

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**Contributory Negligence and the (motor) cyclist**  
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*The author revisits the defence of contributory negligence with a particular focus on road traffic accidents, comparing and contrasting two recent cases involving a pedal cyclist and motorcyclist respectively.*

**Introduction**

The defence of contributory negligence is one which is commonly relied upon by defenders in personal injury actions. It is frequently encountered in litigation arising from road traffic accidents where the defender asserts that the pursuer was partly responsible for the loss sustained. This article examines two recent cases involving road accidents in which an attempt was made to rely upon the defence, although in only one of those cases was that attempt successful.

**Contributory Negligence**

At common law contributory negligence operated as a complete defence to an action for damages (see *Butterfield v Forrester* (1809) 11 East 60). In other words, a pursuer who was found to have been contributorily negligent recovered no damages at all. The position was changed by the Law Reform (Contributory Negligence) Act 1945 in terms of which a pursuer who was partly to blame for his own loss or injury simply saw a reduction in the award of damages-his claim was not defeated altogether. The 1945 Act undoubtedly heralded a fairer approach. Section 1(1) of the Act provides as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The courts have had occasion to consider what constitutes a "just and equitable" reduction in a variety of contexts ranging from industrial injury cases (*Stapley v Gypsum Mines Ltd* [1953] A.C. 663) and public liability cases (*Sayers v Harlow Urban District Council* [1958] 1 W.L.R. 623) to occupiers' liability cases (*Cowan v Hopetoun House Preservation Trust* 2013 Rep L.R. 62).

While it is clear that the defence has applied in a broad spectrum of contexts, many cases involving the defence arise from accidents which have occurred on the roadway. Indeed, an early decision following the introduction of the 1945 Act was *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 K.B. 291. It, too, like the cases examined in this article, involved an accident on the road. Davies had been standing on the sidestep of a dust lorry while it was in motion, in contravention of instructions given to him. He was fatally injured when an omnibus collided with the dust lorry. Although both the dust lorry driver and omnibus driver were found to have been at fault, Davies, too, was found to have been partly to blame and damages to his widow were reduced by 20 per cent on account of his contributory negligence. "[T]he fool-hardy, dangerous, disobedient conduct of the deceased in riding as he did upon the

steps of the lorry, [was] plainly a most vital consideration” (per Evershed L.J. at p.316).

More recently, in *Jackson v Murray* 2015 S.C. (U.K.S.C.) 105; 2015 S.L.T. 151, the UK Supreme Court held that the pursuer in the action (who was thirteen years of age at the time of the accident) had been contributorily negligent. Having alighted from the school bus, she darted across the road from behind the stationary bus and was injured when she was struck by a car. There was no street lighting at the locus and light was fading. The school bus was displaying hazard warning lights, its headlights were on, and it displayed square yellow and black graphic signs to the front and rear indicating that it was a school bus. The defender was travelling at approximately 50 mph. (A 60mph speed limit applied.) Although the defender had a view of the bus for 200 metres, he did not slow down as he approached it, nor did he consider the possibility of someone emerging from behind the stationary bus and attempting to cross the road. The defender did not see the pursuer until the moment of impact. However, had the pursuer looked to her left within a reasonable time before stepping out into the road, the defender's car would have been within such proximity that she ought to have realised that it was unsafe to cross. The Supreme Court held that, in those circumstances, the pursuer was 50% contributorily negligent. Lord Reed expressed the majority view of the Supreme Court (at para.43) that “the defender’s conduct played at least an equal role to that of the pursuer in causing the damage and was at least equally blameworthy.”

More recently, the defence has been considered in two cases arising from accidents involving a pedal cyclist and motorcyclist respectively. It is these cases –both of which were heard in the All Scotland Sheriff Personal Injury Court -to which attention is now turned. The first of those cases is *Daly v Heeps and Markerstudy Limited* 2018 G.W.D. 2-45, a decision of Sheriff Peter J Braid, and the second is *McIntosh v Aviva Insurance UK Limited and Thomson* 2018 G.W.D. 3-57; [2018] SC EDIN 2 a decision of Sheriff Kathrine Mackie.

### ***Daly v Heeps and Markerstudy Limited***

The pursuer in *Daly* was participating in a cycling event when he collided with a trailer which was being towed by a car driven by the first defender. The cycling event took the format of a team time trial over public roads which were not closed for the event. The pursuer was participating with his team-mates, Mr Barclay and Mr Dick. The cyclists had no priority over motorists. The normal rules of the road, including the provisions of the Highway Code, therefore applied. Marshals, who were wearing high-visibility jackets, were present on the course and signs warned other road users that a cycling event was taking place. During the race, the pursuer and his team-mates generally adopted a single file formation. For aerodynamic efficiency, the team cycled as close together as possible. This meant that the cyclists in second and third position had to keep their eyes on the rear wheel of the bicycle in front rather than on the road, so as to avoid colliding with the bicycle in front.

The route consisted of three left-hand turns, the first of which (from the A91 into an unclassified road) the pursuer missed. He had to turn back and turn right before catching up with his team-mates on the unclassified road. It was on this road that the accident occurred. It was a single-track road with passing places. It was rough at the edges with potholes. The speed limit was 60 mph. The surface was tarmac and there was no centre line marking. The width of the road at the point where the accident

occurred was somewhere between just over 11 feet and 12 feet 3 inches. Near the junction of the unclassified road with the A91 there was a sign indicating that it was a narrow, single-track road. There was a further, small, "narrow road" warning sign near the entrance to Newbigging Farm. The pursuer's route took him past both of these signs but he noticed neither of them. As they passed Newbigging Farm, the team members were cycling in single file, at around 25 miles per hour. Mr Barclay was in the lead, followed by Mr Dick, with the pursuer taking up the rear. Their road position was around one third of the width of their side of the carriageway from their nearside.

Meanwhile, the defender was approaching in the opposite direction, in his Ford Explorer. He had joined the unclassified road from the A977. At that end of the road, there were also "road narrows" and "single track" road signs. The Ford Explorer was towing a boat on a trailer. The car was 6 1/2 to 7 feet wide and the trailer, including its outriders, was about 8 feet 2 inches at its widest point. The defender was aware that a cycling event was taking place on the unclassified road, having already passed at least two groups of cyclists who were participating in it. Mr Barclay saw the Ford Explorer approaching when it was around 200 yards in front of him. He moved to his left, and shouted a single-word warning, "nose", to his team-mates. When he was around 75 yards from the Ford Explorer, he saw that it was pulling a trailer. He did not issue a further warning to his team-mates. Mr Dick also moved to his left, taking up position behind Mr Barclay. The pursuer, who had heard Mr Barclay's warning, gave a momentary glance and saw the Ford Explorer. He was approximately 200 yards from it. He did not look up again. He moved across to his left. He moved his hands from the racing position (on the centre of the handlebars) to a position more towards the outside of the handlebars. All three cyclists were no more than a foot from their nearside verge. When the defender saw the approaching cyclists there were no passing places between him and them. He was travelling at about 25 miles per hour. He slightly reduced his speed but was still driving in excess of 20 miles per hour. He maintained his direction of travel. The nearside wheel of his trailer was not hard up against the edge of the tarmac surface of the road. The defender's rig was encroaching on to the pursuer's carriageway, leaving insufficient space for the cyclists to pass safely at speed. Mr Barclay and Mr Dick proceeded past the Ford Explorer and trailer, missing it by a matter of inches. As the pursuer passed the Ford Explorer, he assumed that he had safely negotiated the hazard presented by it. He did not see the trailer. As the pursuer passed the trailer, his upper right arm and right hand came into contact with the offside outrider of the trailer. He fell from his bicycle and sustained injury.

In a subsequent action of damages against both the Explorer driver and the driver's insurers, the pursuer asserted that the first defender had been negligent. Liability was denied. Quantum was agreed and the proof was restricted to the issues of liability and contributory negligence.

The defender was alleged to have been negligent in two respects. First, it was said that he was driving too fast given the nature of the road and his knowledge that there was a cycle event taking place. Second, it was said that he failed to be as far over to the left as he could be.

As far as the issue of speed was concerned, the sheriff found that the defender was travelling at just under 25 mph. He stated (at para.33):

“[I]n my view the defender was driving too fast, in that he was on his own admission driving at a speed at which it was impossible for him to stop his “rig” before meeting the cyclists. Not only was that in contravention of ...the Highway Code... but the defender was aware ...of the... likelihood, of coming across further cyclists given that he knew that there was a cycle event taking place and had already passed at least two teams who would have been travelling, it is reasonable to infer, at similar speeds to that of the pursuer. The defender was also aware that he had passed a stopping place. He was also aware that it was a single track road and that he was taking up most of it. He ought therefore to have been travelling at a much slower speed, such that he was able to stop his rig completely, in the event of encountering a further team of cyclists, as he was likely to do. Finally, the defender was aware...that often other road users initially do not see the boat on the trailer behind his car, which was all the more reason to proceed at a speed which did enable him to stop safely whilst proceeding along a narrow road. In relation to his speed, therefore, my view is that the defender failed in his duty of reasonable care to the pursuer by driving at the speed which he did.”

As far as the issue of the rig’s encroachment on the pursuer’s side of the road was concerned, the perception of an independent witness who was following the cyclists, was that the car was not giving them enough room. The sheriff concluded that the defender was further from his nearside verge than he claimed, such that the gap which remained was unsafe for the cyclists to pass through. The sheriff, however, accepted the defender’s evidence that he was trying to avoid the pot-holes. Having observed that the proof had been conducted on the basis that it would be negligent for the defender to have been any distance at all, however short, from his nearside verge, the sheriff indicated (at para.34) that “the position [was] more finely nuanced than that.” He continued (at para.34):

“The defender’s duty was to drive with reasonable care. Bearing in mind that it would indeed have been dangerous for his trailer wheel to have gone into a pothole, at least at a speed of 25 miles per hour, and that the standard is one of reasonable care, not perfection...[*Ahanounu v South East London and Kent Bus* [2008] EWCA civ 274], I do not consider that the fact that the defender’s trailer was not hard up against the edge of the road surface was necessarily negligent. A driver must be allowed some margin of error. However, it also seems to me that the road position and speed are inextricably linked, in that the faster the defender was driving, inevitably the more difficult it would be for him to position his car as close to the edge of the road as it could reasonably be (and the greater the risk of damage if he did drive into a pothole). The defender was also, or ought to have been, aware that the faster he drove, and the further he encroached on to the cyclists’ side of the road, the smaller the gap they had to negotiate at speed and the greater the risk of an accident. ...Accordingly, I do find that the defender’s road position was negligent having regard to the speed at which he was travelling. Putting that slightly differently, had he been driving slower, he ought to have been able to have been even marginally further over to his left, and if he had been, the accident probably would not have occurred given that, as it was, it was only the pursuer’s right shoulder which struck the outrider. I therefore also find that the defender’s negligence caused the accident.”

Turning to the issue of the pursuer's contributory negligence the sheriff stated (at para.35):

"However, the pursuer cannot escape criticism either. He was not looking at the road, even after he was aware that the defender's car was approaching, and he did not see the trailer. He was also travelling at excessive speed, having regard to the respective widths of the road and the defender's rig. He ought to have been alerted to the narrowness of the road by the two signs which he had passed (but did not see, because he was not looking). The duty on the pursuer to take reasonable care for his own safety was not lessened by the fact that he was taking part in a team trial cycling event. It may well be that he chose to rely on Mr Barclay to act as his "eyes and ears", and it may be that Mr Barclay should have shouted a further warning on seeing the trailer, but that does not absolve the pursuer of his duty for his own safety in a question with the defender. ...I find that the pursuer, too, was negligent by virtue of his failures to reduce his speed and to keep a proper look out."

As far as the allocation of blame for the accident was concerned, the sheriff stated (at para.36):

"A striking feature of this case is that substantially the same criticisms can be levelled against each party. Just as the defender was not concentrating on the road, but on the verge, so too was the pursuer's concentration elsewhere. He was not looking at the road, but at the rear wheel of the bike in front. Just as the defender maintained his speed (because he was unable to stop), so too did the pursuer (because he was participating in what was, in effect, a race). Neither party was as close to his nearside verge as he might have been had he been travelling at a lower speed, because of the need to avoid potholes. The accident occurred because the parties approached each other at approximately the same speed, neither hard up against his verge, leaving a very small gap to be negotiated by each of them at a closing speed of 50mph."

The sheriff concluded that the parties contributed equally to the accident and assessed the pursuer's contributory negligence at 50%. He did not discuss in any detail the various authorities to which reference had been made by counsel, noting instead that each case must turn on its own facts and circumstances: *Scott v Warren* [1974] R.T.R. 104.

### ***McIntosh v Aviva Insurance UK Limited and Thomson***

The result was otherwise in *McIntosh*. Although, at first sight, the case bears a passing similarity to *Daly* (in that it involved a defender who was encroaching on the pursuer's side of the road) the pursuer in *McIntosh* was not found to have been contributorily negligent. The pursuer was seriously injured after being involved in an accident with a lorry while he was riding to work on a motorcycle. He was travelling (in a southerly direction) on an unclassified road. The road was a two way, undivided carriageway with no road markings. The second defender (Mr Thomson) was driving a lorry in a northerly direction on the same road. As the pursuer approached a bend close to the entrance to the Mill of Burns farm, he encountered the lorry which was encroaching over the midpoint of the road, leaving the pursuer insufficient space to

pass safely. The pursuer was forced to take evasive action, which resulted in him parting company from his motorcycle. He suffered various injuries as a result. Quantum was agreed and the issues at proof were restricted to the position and speed of the lorry and any contributory negligence on the part of the pursuer.

The Sheriff found that the width of the tarmac surface of the road was 4.4 metres. The width of the lorry, including the mirrors, was 2.6 metres. Even if the lorry's nearside wheels were at the edge of the road it encroached over the road's mid-point. At each side of the road there was an area of dirt, mud and detritus. Trees and other foliage around the farm together with the farm buildings created an obstruction to the view for drivers in each direction at the bend. As the pursuer completed negotiating the bend in question he was confronted by the second defender's lorry. The lorry was blocking the pursuer's lane. It was about 1 metre from its nearside verge. The width of usable road surface left to the pursuer was therefore about 0.8 metres. The pursuer's motor cycle was 0.79 metres wide.

The sheriff held that the second defender failed to keep his lorry in a safe position on the road being as close to its nearside verge as was reasonably possible. She stated (at para.24):

“There was insufficient road space for the pursuer to pass the lorry safely due to the road position adopted by Mr Thomson. Had the lorry been driven with its nearside wheels hard against the nearside verge there would have been sufficient room for the vehicles to pass each other safely.”

The sheriff also found that the pursuer did not have sufficient road space to brake to a stop due to the lorry's position in the road.

On the matter of speed, the sheriff found that, as the defender approached the bend, he was travelling at about 30mph. Such a speed was unsafe due to the width of the road, the width of the lorry and the restricted view at the bend. A safe speed for the lorry on the approach to the bend would have been 20mph.

In relation to the matter of contributory negligence, the defenders argued that the pursuer was travelling at excessive speed for the conditions and layout of the road, that he failed to anticipate the possibility of an oncoming vehicle and that he was unable to stop. As such, it was said that he had contravened the provisions of the Highway Code. In the sheriff's opinion, there was no evidence that the pursuer was travelling at excessive speed. She found that, as he approached the bend, the pursuer was travelling at about 30mph. The speed limit was 60mph. Expert testimony, which was not contradicted, indicated that up to 40mph would be a safe speed for a motorcyclist to negotiate the bend even with a restricted view. The sheriff rejected the second defender's evidence to the effect that the pursuer was in the middle of the road when he negotiated the bend. She found that the pursuer leaned very slightly to his left as he entered the bend and that his motorcycle was positioned about 1 to 1.2 metres from his nearside verge. The sheriff concluded that the pursuer was travelling at a safe speed and was correctly and reasonably positioned on his side of the road as he negotiated the bend. The pursuer had not contributed to the accident. Rather, the accident was caused wholly by the fault and negligence of the second defender.

Sheriff Mackie concluded (at para.45):

“In my opinion, on balance of probabilities, the accident occurred when the pursuer was confronted by the lorry driven by Mr Thomson effectively blocking the road ahead and leaving him insufficient road space to pass the lorry safely. Mr Thomson knew, or ought to have known, that because of the width of his lorry it encroached over the midpoint of the road. Had Mr Thomson adopted a position on the road whereby his nearside wheels were close to his nearside verge the accident would not have occurred. A safe speed for Mr Thomson on approach to a bend with a restricted view was about 20mph. Had he approached the bend at that speed with his nearside wheels close to the nearside verge the pursuer would have been able to pass safely even if travelling at up to 40mph. The pursuer was correctly and reasonably positioned on his side of the road travelling at about 30mph. On being presented with the lorry blocking his road ahead he reacted by applying emergency braking and parting company with the motorcycle. Had he not done so it is likely that a much more serious and possibly fatal accident may have occurred. Even if it was theoretically possible for the pursuer to have manoeuvred his motorcycle past the side of the lorry, in my opinion, the pursuer cannot be criticised for adopting the course he did when faced with the dilemma presented by the position of the lorry.”

## **Conclusion**

Both *Daly* and *McIntosh* involved defenders who were encroaching on the other side of the roadway when the accidents in question occurred. In *Daly*, although the first defender was at fault, the pursuer's own cycling was also susceptible to criticism with the result that his damages were reduced by 50%. In *McIntosh*, on the other hand, the pursuer was considered not to be to blame for the accident in any way, his mode of motorcycling being entirely reasonable in the circumstances. Contrasting these two cases serves to re-emphasise the fact sensitive nature of decisions involving the defence of contributory negligence. No two cases will be identical in every respect and the precise facts in each case will demand careful scrutiny in order to determine whether a finding of contributory negligence is warranted and, if so, in what manner responsibility should be apportioned.